United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-1087

To be Argued by
DANIEL MARKEWICH

In The

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

vs.

BENNY ONG, WONG WAH, TOM HOM and ALBERT YOUNG,

Defendants-Appellants.

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P/S

On Appeal from The United States District Court for the Southern District of New York

BRIEF FOR DEFENDANT-APPELLANT, BENNY ONG

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BRIEF ON BEHALF OF DEFENDANT-
APPELLANT BENNY ONG

PRELIMINARY STATEMENT

This is an appeal by defendant-appellant BENNY ONG from a judgment of conviction entered in the United States District Court for the Southern District of New York after a trial by jury (HON. CHARLES L. BRIEANT, JR., presiding) on February 11, 1976.

Defendant Ong was convicted of one count of conspiracy to bribe investigators of the Immigration and Naturalization Service (18 U.S.C. 371) and sixty-five counts of bribing such officials (18 U.S.C. 201(b)).

Ong was sentenced to a term of imprisonment of eight years on each of the bribery counts, and five years on the conspiracy count, all to be served concurrently. Execution of sentence has been stayed pending appeal.

STATEMENT OF FACTS

Lawrence Granelli testified that, since December, 1971, he had been a criminal investigator with the United States Immigration and Naturalization Service (hereinafter "INS") (58).*

Commencing October, 1973, Granelli was assigned to a unit primarily involved in the location and apprehension of illegal aliens (59). On October 14, 1973, at about 6:00 p.m., while Granelli and INS Investigator Henry Brattlie were engaged in an area control operation in Chinatown, the defendant Benny Ong "motioned" to them in the vicinity of 9 Pell Street. Thereupon Granelli and Brattlie approached Ong and the three of them stepped into a hallway (60-61). Ong, who ran the 9 Pell Street gambling club and was the English-speaking secretary of Hip Sing, a Chinese fraternal organization chartered as a non-profit organization (355), told the immigration investigators that he wanted to set up a meeting between the gambling house "bosses" and immigration officials to work out an arrangement for checking illegal aliens in the gambling houses (60-62).

*References to numbers in parentheses without prefixes are to the minutes of the trial.

It seemed to the investigators then that Ong was simply interested in working out a way of keeping the gambling houses open while permitting immigration officials to arrest illegal aliens (364).

Granelli and Brattlie told Ong that they were not high-ranking officials and would have to talk to their supervisor before answering Ong (62). They left Ong and reported to their supervisor, who advised Granelli to return to Ong and tell him that the boss was interested and would be in touch in a few days (364).

By coincidence, Granelli changed partners -- from Brattlie to Lawrence Kibble -- before returning to Pell Street and Benny Ong (365-66). Granelli had told Kibble, after the initial October 14 meeting, that Ong had "again" offered him money (409). Granelli explained, however, that this statement referred to an incident of about a week before, when Ong had shown Granelli money and said, "We can work this out" (408). Granelli had regarded this as a possible bribe offer, but Kibble and he had made no memorandum of the conversation and had not reported it (408, 697). According to Granelli, the use of the word "again" did not signify any prior conversation between Ong and him about a deal between the gambling house bosses and Ong or any prior corrupt payment of money (369-70).

During July of 1973, Granelli had accompanied members of the Chinatown Task Force of the New York City Police Department in a "raid," or "hit," on the 9 Pell Street gambling club (361). At that time, he had not

known that the members of the Task Force were internal security police officers assigned to Special State Prosecutor Nadjari; instead, he had believed the officers to be corrupt (487-90). On occasion Granelli had gone in behind members of the Task Force when they had executed gambling warrants, but during the summer of 1973 Granelli was assigned not to Chinatown itself but to a courthouse on its edge (489). Granelli and Kibble were not themselves corruptly paid off by Ong between the first Chinatown Task Force raid in July, 1973, and October (407). Granelli also denied that he and Kibble "turned the tables" on Ong and reported him as a briber because they were afraid of being caught now that Brattlie had become privy to their payoff scheme (407), and now that they may have known that the Task Force members were undercover, and not corrupt, officers (487-90).

In the evening of October 14, 1973, Granelli and Kibble -- without Brattlie -- returned to Chinatown and told Ong that their boss was interested in his offer and would contact Ong in a few days. Ong said that eight gambling house bosses would each pay $200 weekly in exchange for advance warnings of immigration visits to gambling houses (64-65). Prior to October 14, neither Ong nor anyone else had permitted INS officials to enter 9 Pell Street; nevertheless, on that date Ong offered money in exchange for advance warning (371). Granelli and Kibble said they would have to talk to their supervisor; Ong said he did not trust bosses and would rather deal

with Granelli and Kibble, who should deliver a message to their supervisor (65). This second October 14 meeting was not recorded because the immigration service had no miniature tape recorders and, in any event, Granelli had no idea that money would be discussed (367-69).

After the October 14 meetings, the investigators reported what had occurred to the Federal Bureau of Investigation, and Special Agent Boyd Henry was assigned to the case (66, 727-28). With the consent of the immigration investigators, Henry obtained authorization to record their conversations with Ong as of October 25, 1973 (731). On October 24, Granelli met Ong on Doyers Street and said he could not talk (67).

On November 6, Granelli again met Ong, who told Kibble and Granelli to follow him into 13 Pell Street (68); they did not delay the meeting in order to obtain a tape recorder (381). The three men sat down at a table in a meeting room at 15 Pell Street, and Ong asked why Chinatown was quiet. Granelli said his boss was interested but wanted to know why only eight houses were involved. Ong said that certain houses would go along with his plan but he had not talked to them yet as he had received no answer from Kibble (69). It was agreed at that meeting that Granelli and Kibble would return to see Ong in a couple of days in the same building on Pell Street (391).

Knowing that at the next meeting with Ong the final details of the bribery arrangement would be worked out, Granelli asked Agent Henry if he had authorization to record that meeting (402-03). According to Granelli, Henry told him that there was no authorization yet (403); however, according to Henry, he had had authorization since October 25, but determined not to record because the next meeting, scheduled for indoors, could not be surveilled (731-3[illegible]). Thus no recordings were made until after the final details were worked out at the second November meeting (406).

The purpose of the recording delay was not, according to Granelli, to set up the circumstances so as to make a better case against Ong or to make the immigration officials look innocent and Ong look guilty (407).

On November 8, 1973, without a tape recorder, Granelli and Kibble approached Ong at 15 Pell Street and said their boss was interested. Ong said that the Mott Street bosses thought $200 per week was too much but that Ong's house and the houses on Catherine Street and at 58 East Broadway would pay, with Ong paying a total of $600 weekly for all of them beginning November 15 (72).

The last Chinatown gambling raids prior to the advent of the Chinatown Task Force had been in 1966 (857). After Police Commissioner Murphy had eliminated the

dishonest police officers, gambling enforcement had been all but absent prior to the summer of 1973, when the Chinatown Task Force, sometimes joined by Granelli, had commenced a series of raids on Chinatown clubs (361, 441, 487-90). By the end of 1973, as Ong said: "He don't paying the cops, he can't open" (441).

Granelli and Kibble disclaimed any interest in gambling enforcement (437). However, the early F.B.I. consent forms in this case referred to a gambling investigation (825, 851) and Granelli conceded that, for their own purposes, the investigators often entered behind the police on gambling raids (488). And, in the conversation on March 13, 1974, Granelli said, "With a warrant, the door comes down and everything" (GX*25

On November 6, Granelli admittedly told Ong that the only reason Chinatown was "quiet" was that his boss was interested (69). And when refused entry into the clubs, the INS officials hung around outside waiting for aliens to emerge (378, 532). Granelli claimed to have the ability to tell illegal from legal Chinese aliens by sight (529). The old men in the clubs feared arrest (438), and thus were reluctant to patronize the gambling houses.

*"GX" refers to Government Exhibit. GX 51 is the tape recording of that conversation, GX 25 is the transcript.

It was in this setting that on November 15, 1973, after a phone conversation initiated by Granelli, he and Kibble met Ong and Wong near Columbus Park on the edge of Chinatown and were paid $400 by Ong for himself and Wong. This meeting and the preceding telephone conversations represent the first tape recordings in this case, although Agent Henry had already been authorized to record for three weeks (75-82, 731). Thereafter, Ong and Wong, or sometimes Ong alone, met Granelli and Kibble and gave them money on November 21, 28, December 5, 12, 19 and 26, 1973 (90-91, 93-97, 115-18, 122-30, 141-44, 146-48); many of these meetings were tape-recorded.

Ong and Wong again met the investigators and paid them money on January 9 and January 16, 1974 (162, 163-64); the latter conversation was recorded. On January 17, Granelli sought out Ong and told him that, during a "hit" at 61 Mott Street, a man had come out and, mentioning Ong's name, had talked to two other immigration officers about straightening things out. Ong told Granelli that he knew who the man was and would talk to him. It was agreed that Granelli and Kibble would talk to their boss in case the man wanted the same deal as Ong and Wong (166-68). Granelli then called Agent Henry at home, but was unable to arrange the immediate use of a tape recorder although the F.B.I. office was open (472-74).

After a few minutes, Ong and defendant Tom Hom located Granelli and Kibble, and Tom apologized for his

foolishness in approaching the other immigration investigators on Mott Street. After a conversation in Chinese, Ong said that Tom wanted the same deal as himself, and Granelli accepted subject to his supervisor's approval (166-68).

Thereafter, separately and sometimes together, Ong, Wong and Tom paid sums of money to Granelli and Kibble on numerous occasions from January into July, 1974, when all were arrested. Until the end of March, many of the conversations were tape-recorded. Then, purportedly because Ong and Wong had been arrested by the Chinatown Task Force of Special Prosecutor Nadjari's Office, and for safety reasons, the recording ceased and was not resumed, even after Ong had declined an invitation to search Granelli on April 11 (216-17). For no explicable reason, however, the tape recordings had ceased a few days before the Nadjari arrests (771). Nor was it explained why the telephone recordings, whose safety obviously was unaffected by the Nadjari arrests, ceased permanently on March 13 (771).

Both Wong Wah and Tom Hom began paying the agents after Granelli and Kibble approached Ong immediately after their respective houses were "hit" (70, 74, 471). As for Ong himself, the investigators almost always were the ones who initiated contact each week, even

waking him up on one occasion. They would call him repeatedly if necessary to set up meetings at which money would pass (425-27). Whenever possible, Granelli and Kibble would observe on tape that Ong had initiated and proposed the scheme; Ong, whose command of English was hardly the best, never responded or volunteered that it had been his own idea (429-30). The INS agents, and Agent Boyd Henry as well, wilfully destroyed their original notes and many of their handwritten memoranda (411-12, 654, 793).

ARGUMENT

Introduction

After a two-week trial the defendant Ong was convicted of one count of conspiracy to commit bribery and sixty-five counts of bribery.

Admittedly, the tape-recorded evidence that Ong had made payments to the INS officers was overwhelming. However, the principal defense was not that the defendant Ong had not paid the agents, but that he did so under economic coercion for fear of having his gambling operation destroyed. He also maintained, in cross-examination and summation, that the investigators turned "honest" in order to ensnare him and avoid apprehension themselves as corrupt law enforcement officials. He argued that the conversations with the agents were purposely not recorded until the agents could manage the script so as to make it appear, as it did in the later, tape-recorded, conversations, that Ong had approached them with the bribe offer when, in fact, they had coerced him into payments.

Concededly, the evidence, viewed in the light most favorable to the Government, was sufficient to justify a conviction. However, the defense was not totally without merit, requiring the jury, despite the tape-recorded payments, to deliberate for eight hours before returning a verdict.

Given the defense that he was a victim of economic coercion, the Government's introduction of a mass of irrelevant and highly prejudicial evidence of prior

criminality and the improper and inflammatory remarks of the prosecutor during the summation prevented the jury from dispassionately considering the evidence and reaching a just verdict. The errors detailed below deprived the defendant Ong of a fair trial and were far from harmless. These errors mandate a reversal of his conviction, and a new trial.

POINT I

THE MASS OF IRRELEVANT, UNDULY PREJUDICIAL AND INFLAMMATORY EVIDENCE CONCERNING THE DEFENDANT ONG'S INVOLVEMENT IN OTHER CRIMES DEPRIVED HIM OF A FAIR TRIAL.

During the Government's case the Court admitted a mass of irrelevant, highly prejudicial and inflammatory evidence concerning the defendant Ong's involvement in other crimes beyond those charged in the indictment.

First, the Court admitted into evidence tape recordings in which the defendant Ong and the investigators discussed his and an associate's involvement in narcotics. Secondly, the Court improperly allowed into evidence testimony concerning the defendant Ong's arrest by Special Prosecutor Nadjari. Thirdly, Investigator Granelli, the key Government witness, testified irrelevantly and unresponsively about the defendant Ong's involvement with guns, even after an objection to this same testimony earlier had been sustained and a motion to strike granted.

The effect of this accumulation of irrelevant and highly prejudicial evidence made it impossible for the jury to limit its consideration to the charge for which the defendant Ong was being tried, and, therefore, constituted reversible error. See United States v. Lewis, 447 F.2d 134 (2d Cir. 1971); United States v. Tomaiolo, 249 F. 2d 683,690 (2d Cir. 1957).

1. The Involvement in Narcotics Activity.

Over objection and after a lengthy sidebar conference the Court allowed the prosecution to introduce into evidence tape recordings and transcripts that showed Ong's present and past involvement with, or at least particular knowledge of, the heroin trade. The introduction of these clearly irrelevant conversations was severely prejudicial in that it portrayed the defendant Ong, admittedly an operator of an illegal gambling house, as a far more sinister law-breaker than the relevant evidence revealed.

While ordering the redaction of one tape and transcript referring to narcotics activity,* the Court allowed the Government to introduce and refused to redact tape recordings and transcripts of two conversations involving Ong and the investigators concerning narcotics activity.** These conversations were those of January 23, 1974 (GX16 the tape recording, GX42 the transcript) and February 6, 1974 (GX20 the tape recording, GX46 the transcript).

In the January 23 conversation, Granelli asked Ong what happened at Frank's barber shop at 57 Mott Street. He then told Ong that "a pound of stuff" was taken from the store. Ong corrected him and told him that two pounds were

*The Court redacted the tape recording (GX15) and transcript (GX41) of the January 16, 1974 conversation. "GX" refers to the number of the Government Exhibit.

**The Court then advised the jury that the "totally unrelated" material had been redacted and would not be played (293). The Court thus implanted in the jury's minds the erroneous idea that the remaining narcotics conversations might be of some relevance.

taken. Ong then told the agent that Frank hid the heroin under a sink. In response to the agent's questioning, Ong responded that the value of the heroin was $20,000 and it was "white" as opposed to "brown". He then said he was just relating what he was told and that he "don't do that no more" (GX42, 2-4).

In the February 5, 1974 conversation Ong and Wong spoke with the agents. Ong told the agents that they should catch one Lee Louie, who had "a lot of that white stuff". Granelli told him that the agents were interested in handling a kilo of heroin with a Hartford source. Ong in Chinese said, apparently to Wong (since neither Granelli nor Kibble understood or spoke Chinese), that Granelli was interested in two pounds of heroin and in Chinese discussed the price. Ong then advised the agents not to discuss heroin in front of Tom, who was present briefly. Ong then in Chinese related Granelli's offer and advised Wong not to get involved since it was "very risky" and "will only invite trouble" (GX46, 5-9). He said to the agents that he himself was "afraid those things" and "too old" and didn't "want to get involved" (GX 46, 11). Then Ong and the agents discussed Frank and Ong mentioned that he, like Ong, was a member of Hip Sing, which owns a "couple of million" dollars worth of property * (GX42, 16-17).

*Although this evidence relative to Frank was admitted, Brady material concerning this was denied to the defendant (314-17). Appellant Ong respectfully asks the Court to inspect this material and determine whether the failure to provide it to the defense was error.

Thus, in these conversations the defendant, in response to the agents' prodding, admitted his knowledge of Frank's illegal narcotics activity and the hiding place he used. Further, it was brought out that Frank, like Ong, is a member of the Hip Sing organization. Moreover, the defendant in these conversations indicated he had at one time been involved in narcotics activity but that he was now too old to get involved.

These conversations were wholly irrelevant to the issue at hand. In addition, their admission seriously prejudiced the defendant. First, they portrayed him as a former narcotics trafficker and one presently knowledgeable about drugs. Second, they portrayed him as an associate in Hip Sing of a major narcotics trafficker - one found in possession of two pounds of heroin.

This attempt to link Ong with Frank was seriously prejudicial. Ong was described in the Government's opening statement (23), during Granelli's testimony (60,225), during the prosecutor's summation (952), and even in the indictment (1132) as an officer and as the "English-speaking secretary" of Hip Sing. There was throughout the trial an effort to denigrate this important position and depict this legitimate fraternal group as a "powerful" criminal organization (952). For instance, over objection the Government brought out, without any apparent relevant reason, in the direct testimony (as well as in the tape recording), that Hip Sing controlled two million dollars worth of property (191). It was repeatedly brought out that

Hip Sing controlled the gambling club (191,225,356). The attempt to tie Ong and Frank together was thus clearly a blatant effort to tar Ong with "guilt by association" and to imply that Hip Sing was a criminal organization, rich from narcotics as well as gambling. In this setting, Hip Sing's "corruption" was bound to rub off on Ong in the jury's minds.

The Court apparently recognized the severe prejudicial effect and minimal probative value of such evidence, but felt that the prejudice most affected the absent co-conspirators (159-60, 202,262). It stated:

> "I have redacted that, what I think of as the principal narcotics discussion here, but I am not going to redact anything where the general flavor of the conversation is not such as to create an undue prejudice to the alleged co-conspirators." (270)

In actuality, of course, the prejudice was most severe with respect to the defendants involved in the conversation.

The Court's reasoning in admitting these conversations is not quite clear. Apparently, the Court felt that if the narcotics conversation was part of a larger relevant conversation, it should be admitted under "the rule of completeness" (159,160). Moreover, it felt that the conversations were admissible to show the relationship with the agents (264,266). Neither of these reasons has merit.

First, the Court apparently misunderstood "the rule of completeness." The rule, codified in Fed. R. Evid. 106, provides, "[w]here a writing or recorded statement

or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it". (underscoring added)

The "rule of completeness" may not be relied on, over the defendant's objections, to force the inclusion of references to other crimes in a statement which the prosecutor otherwise would not have been permitted to introduce. "Rule 106 is designed to protect the adversary and not to provide a method to subvert other exclusionary rules". 1 Weinstein, Evidence 106-10. See, also, McCormick, Evidence (2d Ed.1972), 130-31. Here, of course, the rule was used as a sword of the prosecutor rather than as a shield for the defense.

Secondly, the conversation was at most minimally relevant to show the relationship between the agents and the defendant. It was the investigators, not any of the defendants, who initiated the narcotics discussion and who probed the defendant. It was the defendant who cautioned Wong against involvement and refused to involve himself. The serious admissions he made of knowledge of heroin trafficking and his past involvement* were in no sense probative of his relationship with the agents.**

*Indeed, his sole involvement appears to be, as his counsel pointed out at sidebar, conflicts involving opium smoking some forty years ago (323).

**As for the portions of the narcotics dialogue that were in Chinese between Ong and Wong, the Court finally realized, after the damage had been done, that they had no real bearing on the facts of the case; "I know that now" (627-29).

Indeed, it was manifestly unfair to allow the admission of these recordings. The investigators, no doubt aware that any admissions might be used against Ong in a subsequent bribery trial, fished for admissions of his narcotics activity. The statements were in no sense volunteered or spontaneous. Simple fairness should prohibit their use.

One cannot conceive of anything more prejudicial in a bribery case involving gambling houses than admissions of narcotics involvement. Indeed, despite allowing in these conversations, the Court several times stated that the narcotics had nothing to do with this case (202-03, 627, 1017-18). Indeed, if so, one must ask why the issue was allowed to be introduced.

In United States v. Jacangelo, 281 F. 2d 574 (3d Cir. 1960), the reception of evidence of a statement in a defendant's confession that he was on probation and bail required a reversal of his conviction. This evidence of other crimes, the Court said, was "intrinsically inadmissible as highly prejudical information about a collateral matter not connected with the offense charged". Id. at 576. The Court noted that it would have been a simple matter to delete one sentence from the confession. It also ruled that a limiting instruction, as given in this case, did not cure the error. Here also it would have been a simple matter to excise the material concerning narcotics, just as certain other material was deleted.

The error here was severely prejudicial. The transcripts of the conversations were, over defense objection, given to the jury to take into the jury room (1178). Moreover, one of the tapes in question, the January 23 conversation - (GX16) - was, among others, played back to the jury, at its request, during its deliberations (1196).

Moreover, the fact that the improperly submitted statements were part of a tape recording made them especially prejudicial. Recognizing the great impact of tape recordings, this Court, in holding that a limiting instruction would not cure inadmissible and prejudicial statements allowed into evidence, in United States v. Cianchetti, 315 F.2d 584,591 (2d Cir.1963), realized that it was "doubtful" that improperly admitted and highly prejudicial matter concerning the defendant "could have been 'wiped from the brains of the jurors', especially in light of the impact which the playback of a recording - as distinguished from the reading of an ordinary statement - had upon the jury."

Whatever conceivable, if any, probative value this evidence had, the probative value was heavily outweighed by the danger of unfair prejudice. Whatever discretion the trial judge has in the admission of evidence of the type, see United States v. Ravich, 421 F. 2d 1196 (2d Cir.1970), cert. denied, 400 U.S. 834 (1970), it is clear that he abused that discretion here.

2. The Nadjari Arrests

Over objection Agent Cranelli was allowed to testify that Ong had told him that he had been arrested by police from Special Prosecutor's Nadjari's office (211). While arguably Ong's statements that he had made payments to police were admissible on the issue of intent, Fed. R. Evid. 404(b), Glasser v. United States, 315 U.S. 60 (1942); United States v. Brettholz, 485 F.2d 483,488 (2d Cir. 1973), the fact of the arrest was irrelevant and unduly prejudicial.

The defense in this case was that of economic coercion. See, United States v. Kahn, 472 F.2d 272 (2d Cir.), cert. denied, 411 U.S. 982 (1973). While admitting payments to the INS investigators, the defendant Ong contended that he was compelled to make such payments in order to prevent them from destroying his gambling operation. In short, he claimed to be a victim and not a corrupter. Whatever the testimony about past payoffs, the admission of the testimony about the Nadjari arrest indicated that in the opinion of another prominent law enforcement official besides the U. S. Attorney, the defendant was presently a corrupter and not a victim.

The Court's direction to the jury not to speculate as to what the defendant was arrested for was ineffectual (211). Indeed, the jury was no doubt aware that Mr. Nadjari was the Special State Prosecutor to investigate corruption in the criminal justice system. It must have been obvious to the jury that the arrest was for bribery

of policemen.* If not, there was the greater danger that they would "speculate about other bad acts the defendant may have committed." United States v. Reid, 410 F.2d 1223,1226 (7th Cir.1959). Further, the introduction of the image of the widely-publicized Special Prosecutor -- a man designated to go after the major corruptors in the state criminal justice system -- created an aura that the defendant was a major figure in corruption, as the prosecutor impermissibly stressed in summation (1095).**

Although the fact of the defendant's arrest may have become relevant later in the trial to explain why the agents stopped tape recording,*** it was not admissible at the juncture in the trial when it was admitted. Indeed, had it not been admitted, the defendants might have chosen not to explore that area and thus avoided "opening the door" to its admission. However, once the evidence was improperly admitted, they had no reason to shy away from that area.

3. The "Gun Problem"

Early in the direct testimony of the Government's principal witness, Investigator Granelli, the witness was asked what was said during his meeting with the defendant

*As pointed out later, in Point II(7), infra, the prosecutor in his summation specifically told the jury the arrest was for bribery.

**See Point II (7), infra.

***The Court, however, specifically stated at one point that the reason the Government stopped taping was irrelevant (216).

Ong on December 3, 1973. Granelli answered, "Mr. Ong said that he had straightened out the gun problem" (101). After an immediate objection and some colloquy, the Court, in the presence of the witness, struck that testimony with leave to the Government to renew by an offer of proof. It then instructed the jury to disregard "any discussion about a gun. It has nothing to do with this case."* (102)

The sustaining of the objection, and the instruction that only re-emphasized the "gun," did not cure the error. "...After the saber is thrust, the withdrawal of the saber still leaves the wound". United States v. Rudolph, 403 F.2d 805 (2d Cir. 1968). This wound was, moreover, further opened by Granelli's obvious effort to again inject the gun issue into the case during cross-examination.

During cross-examination Granelli was questioned about a meeting on December 5, 1973 with the defendant Ong:

> "Q Agent Granelli -- Investigator Granelli, with respect to December 5, 1973, do you remember what happened on that day?
>
> A December 5, 1973?
>
> A Yes.
>
> A I believe we had a meeting with Mr Ong and Mr. Wong.
>
> Q Do you have any further recollection than that?

*Indeed, the entire December 3 discussion had little or nothing to do with this case, as no money passed on that date.

A I believe Mr. Wong on that occasion said -- I believe Mr. Ong paid $400 to Investigator Kibble and I believe there was some conversation both with Ong and Wong with relation to Catherine Street.

Q Do you recollect on direct examination not remembering any of that conversation until you read the transcripts?

A No, I don't. I don't remember.

Q Is your recollection today of the meeting itself or only of the content of the transcripts in your memorandum?

A Probably of the meeting. It is a meeting where the -- probably of the meeting. It was a meeting following that December 3rd meeting where we discussed the gun problem.

Q Do you remember the details of the meeting, of this meeting, December 5?

A Not detail, sir, no. Not all the details, I don't think so.

Q Do you remember the defendant saying to you on December 5, 1973 that someone is paying the cops; "He don't paying the cops he can't open"?

A Do I recall Mr. Ong saying that?

Q Yes.

A. Yes, sir. I believe he was talking about Jimmy Eng, a man called Jimmy Eng."

(440-41) (underscorings added)

Granelli's reference to the "gun problem" was an obvious nonsequitur. It was clearly unresponsive to the specific question and general line of questioning. It was quite plainly an effort to again bring to the jury's attention a most prejudicial matter which the judge had specifically excluded earlier. It was part of the apparent effort by the Government to "suggest that [Ong's] entire

career has been reprehensible."* United States v. Beno, 324 F.2d 582, 589 (2d Cir.1963), cert. denied, 379 U. S. 880 (1964).

Although no objection was taken to the mention of the "gun problem" at this time, there was no reason to object. The Court had earlier instructed the jury that the gun was irrelevant. Any further objection or instruction would have merely emphasized the issue and further inculcated in the jury's mind the defendant's involvement with guns.

The admission of this evidence was clearly improper. Injection of proof of possession of a weapon totally unrelated to the crime "has consistently been regarded as prejudicial error requiring a new trial." United States v. Reid, supra, at 1226-27. What compounds the error, of course, is the egregious manner in which the Government's principal witness, in clear violation of the judge's earlier ruling, disingenuously again injected the issue.

Conclusion

The introduction of this mass of unrelated and irrelevant evidence deprived the defendant Ong of any

*Likewise, Granelli went out of his way to refer to Ong's allegation that he knew District Attorney Mackell (185) and, in sustaining the objection, the Court made gratuitous reference to "transactions or conversations" between Ong and Mackell. This further impermissibly injected an aura of general official corruption into the trial, as the jurors surely knew that Nadjari had prosecuted and convicted Mackell. Curiously, the federal prosecutor committed the same error as Nadjari had been criticized for in the Mackell case: "the prosecutor repeatedly attempted to introduce irrelevant evidence having a severely prejudical effect." People v. Mackell, 47 A.D. 2d 209 (2d Dept. 1975).

semblance of a fair trial.

As this Court said in United States v. Tomaiolo, supra, at 690:

> "In summary, by receiving this mass of inadmissible, irrelevant and highly prejudicial testimony, the District Court permitted the prosecution to paint the defendant Tomaiolo as a bad man, associated with criminal companion, who would do most anything. The accumulation of these errors made it impossible for the jury to limit its consideration to the charges for which Tomaiolo was being tried, and in sum, they constitute reversible error."

POINT II

THE IMPROPER AND HIGHLY PREJUDICIAL REMARKS MADE BY THE PROSECUTOR DURING THE SUMMATIONS DEPRIVED THE DEFENDANT OF A FAIR TRIAL.

During his closing argument and his rebuttal the United States Attorney made improper and highly prejudicial and inflammatory remarks. In these remarks the prosecutor improperly gave his opinion of the evidence, invoked the prestige of the Government, called upon the jury to consider the defendant's demeanor, referred to items not in evidence and characterized the defendant's criminality. In addition, during defense counsel's summation the prosecutor improperly interrupted to insinuate there was additional evidence of the defendant's criminality beyond what was introduced at trial. The accumulation of these errors deprived the defendant Ong of a fair trial.

1. The Expression of His Own Opinion.

At the outset of his summation the prosecutor gave the jury his opinion of the Government's case:

> "Now, this trial has lasted about a week and a half now, and I do not expect to be very long in my remarks to you this morning, because, quite frankly, I think that the evidence in this case speaks very loudly for itself" (932). (underscorings added)

While the use of the terms "I think" and "speaks very loudly for itself" may be somewhat less direct and perhaps therefore somewhat less egregious than other

opinions of the strength of the Government's case, coupled with the phrase "quite frankly," the underscored statement clearly put the credibility and integrity of the United States Attorney's Office into the case. Indeed, by use of the phrase "quite frankly", the prosecutor explicitly and intentionally placed his own candor and credibility in issue.*

It is, of course, improper for the prosecutor to assert his personal belief in the strength of the evidence. United States v. Salazar, 485 F. 2d 1272 (2d Cir. 1973). The strength of the evidence is for the jury, not the prosecutor, to determine. See Harris v. United States, 402 F. 2d 656 (D.C. Cir. 1968).

In this case putting the integrity of the United States Attorney's Office behind the testimony was particularly prejudicial. The U. S. Attorney's office was to some degree involved in the investigation since calls to the defendant were made and taped from the U. S. Attorney's office. The main thrust of the defense was that the INS agents, prior to the commencement of taping their conversations with Ong, had initiated the unlawful payments. By putting his own credibility in issue, the prosecutor not only wrongly vouched for the agents' credibility, but also indicated improperly that

*During his rebuttal the prosecutor further put his office's integrity into the case by arguing that if the defendants were victims of coercion, they did not have to complain to then Attorney General John Mitchell since they could have complained to his own office (1109).

their testimony was corroborated by what his office knew of the investigation. See United States v. Somers, 496 F.2d 723, 740 (3dCir. 1974).

2. His Attempts To Invoke the Prestige of the Government.

Later in his summation the prosecutor attempted to place the prestige of the Government behind the prosecution:

> "Ladies and gentlemen, the public is represented in this courtroom and has a stake in the outcome of this case.
>
> The United States Government has a deep interest in seeing to it --" (966)

An objection at that point was sustained but no curative instruction was given.

The prosecutor should not put the prestige of the Government behind the prosecution. United States v. LaSorsa, 480 F.2d 522 (2dCir. 1973), cert. denied, 414 U.S. 855 (1973). Nor should he intimate that a vote for conviction is a vote for the public good. See United States v. D'Anna, 450 F.2d 1201 (2dCir. 1971). Whatever effect the sustaining of the objection had, it is clear that the prosecutor had already made his point, and the prejudice could not be undone.

3. His Derision Of the Defense.

Moreover, the prosecutor deprecated the defense by stating that if there were no tape recordings, the defendants "would have denied offering or paying any of this money " (964). In essence he said that the defendants

were willing and ready to fabricate a defense and clearly implied that the defense presented was similarly fabricated. Such a suggestion is clearly improper. United States v. White, 486 F. 2d 204, 206 (2d Cir. 1973), cert. denied, 415 U.S. 980 (1974); Harris v. United States, supra. Moreover, by this argument the prosecutor impugned the integrity of the defense attorneys by implying that they would participate in a sham defense. See United States v. Burse, - F.2d - (2d Cir., decided March 8, 1976, Docket 75-1388), slip op. 2507, 2512.

The Court felt compelled on its own initiative to interrupt the summation and explain to the jury that it should not consider any speculation as to what the defense would have been under different circumstances (964). This instruction, however, did not cure the prejudicial impact of the prosecutor's remarks.

4. His References to the Defendants' Appearance.

On another occasion the prosecutor apparently called upon the jury to consider the demeanor of the defendants, all of whom, of course, were Chinese:*

> "Please take a good look at all four of the defendants, ladies and gentlemen.
>
> Are these unwary innocents, or are they greedy businessmen willing to corrupt public officials to insure the success of their illegal businesses?" (952).

*None of the jurors or other participants in the trial were Chinese (S 6). "S" refers to the minutes of sentencing on February 11, 1976.

The demeanor of a defendant who has not testified is, of course, irrelevant to the issue of guilt or innocence of the crimes charged. See United States v. Wright, 489 F.2d 1181 (D.C. Cir. 1973). In fact, the Court saw fit to interrupt one of the defense counsel, who was discussing this remark in his summation, to instruct the jury to that effect (1091-92).

The prosecutor's explanation, in his rebuttal (1094), that what he asked the jury to do was to look at the evidence is, very simply, belied by his own words.

5. His Reference to Unadmitted Jencks Material.

At another point in his summation the prosecutor attempted to bolster his case by referring to apparently consistent reports which were not and could not be introduced into evidence. He referred first to the "over fifty" consent forms. Secondly and more importantly, he referred to "Boyd Henry's 150 pages of bribery reports" (936).

FBI Agent Henry's reports of the activities of Investigators Granelli and Kibble in this investigation, while mentioned in the trial, were Jencks material and, of course, inadmissible, upon objection, to bolster the testimony of Granelli and Kibble. By referring to the reports and the number of pages in them, the prosecutor gave the impression that they corroborated the testimony of the INS agents. By this argument he sought to argue from items which were not, and which could not, over objection,

be, admitted into evidence. Such an argument was improper. Johnson v. United States, 347 F. 2d 803 (D.C. Cir. 1965); see also United States v. Fearns, 501 F.2d 486 (7th Cir. 1974).

6. His Assertion of a Crucial Fact Not in Evidence.

In his rebuttal the prosecutor bluntly asserted a fact not in evidence which may have had a substantial impact on the jury.

The defense had contended that prior to the dates the Government agents began recording their conversations, they had initiated bribes from the defendant Ong. Indeed, in his summation, one of the defense counsel underscored this point by reading to the jury the "consent form" the agents were asked to sign by the FBI before their conversations were taped.* From this language, counsel argued, it appeared that even the FBI was suspicious of the INS agents (1074).

The Assistant U. S. Attorney, in his rebuttal, in order to answer this argument, which he apparently

*The consent form he read is as follows:

> "I, James Kibble, hereby authorize Boyd B. Henry, Jr. and Lanny R. Crump, who have previously identified themselves to me as special agents of the Federal Bureau of Investigation, to place a device on my person for the purpose of monitoring and recording my conversations this date with Benny Ong or others, with Ong regarding gambling houses in Chinatown, New York City.
>
> "I freely authorize this, and no threats or promises have been made to me." (1074).

did not anticipate and prepare for during the testimony, stated, without any basis in the evidence:

> "Once again we hear about this consent form. Boyd Henry asked these agents to sign a consent form because he so doubted their credibility that he wanted to have it on paper. That's ridiculous. This is a standard consent form. The FBI gets it every time anybody puts on recording equipment." (1109) (underscoring supplied)

References in summation to facts not in evidence are always improper. United States v. Bivona, 487 F. 2d 443 (2d Cir. 1973); United States v. Martinez, 514 F.2d 334 (9th Cir. 1975); United States v. Bell, 506 F.2d 226 (D.C. Cir. 1974). And the Government cannot fill in gaps in its proof by factual assertions by the prosecutor. United States v. Bivona, supra, at 446.

While the quoted remarks were objected to and the jury was promptly instructed that its recollection of the testimony was controlling (1109), it was impossible to "unring the bell", United States v. Martinez, supra, at 343. The courts have realized "the great potential for jury persuasion which arises because the prosecutor's personal status and his role as a spokesman for the government tend to give to what he says the ring of authenticity." Hall v. United States, 419 F.2d 582, 583 (5th Cir. 1969). This is particularly so when the fact is one that is considered to be peculiarly within the knowledge of the United States Attorney -- such as what is standard FBI procedure.

In United States v. Latimer, 511 F.2d 498 (10th Cir. 1975), the Court reversed a bank robbery conviction because of a factual assertion by the prosecutor unsupported by the evidence. In that case, the bank tellers testified that the bank camera had been activated, but there was no testimony as to why the film was not introduced. In his summation, defense counsel argued the inference that the film did not identify the defendant. The prosecutor countered by stating that the camera had malfunctioned.

In reversing the conviction, the Court rejected the Government argument that it had a right to make such an assertion to counter the adverse inference advanced by the defense. It found that the statement violated two fundamental principles. First, the prosecutor went beyond the record and asserted facts not proven. Second, the prosecutor improperly brought into the case his personal knowledge and belief.

Similarly, in this case the United States Attorney had no right to make the assertion that the consent form was "standard". By doing so he violated the same principles that the prosecutor did in Latimer. Such a statement was clearly improper and highly prejudicial.

7. His Improper Characterization of the Defendant Ong.

During his rebuttal, the prosecutor called Ong "Chinatown's chief corrupter for twenty years" (1095). While there was admittedly evidence that Ong had been in-

volved in corruption for that period of time, there was no proof of his supposed top ranking among the corrupters of Chinatown. Thus, again, by this statement the prosecutor brought in his personal belief. Moreover, this statement intimated that the Government had knowledge that had not been put before the jury. See United States v. Burse, supra, at 2513. This statement is similar to the characterization of the defendant as a "repeated junk dealer", which this Court found "most prejudicial" in United States v. Gonzales, 488 F. 2d 833, 836 (2d Cir. 1973) or a "hoodlum" which the Court in Hall v. United States, supra, at 487, found reprehensible. See, also, United States v. Martinez, supra.*

As the Court stated in Hall, at 587:

> "This type of shorthand characterization of an accused, not based on evidence, is especially likely to stick in the minds of the jury and influence its deliberations. Out of the usual welter of grey facts it starkly rises -- succinct, pithy, colorful, and expressed in a sharp break with the decorum which the citizen expects from the representative of his government."

8. His Implication of Superior Knowledge Of Narcotics Activity.

In his summation counsel for defendant Ong,

*The prosecutor also improperly told the jury that defendant Ong had been arrested for bribery by Nadjari's office (960), despite the Court's strict admonition during trial to the Government not to mention the crime for which Ong was arrested by that office (211), and despite any evidence that Ong had been arrested for that crime.

in order to combat the Government tapes concerning Ong's alleged involvement in narcotics, argued:

> "It is absurd to believe that Ong was educated in narcotics in light of the fact that on February 6th, 1974, after having a discussion with the INS people in which he sort of led them on, a discussion about narcotics--."

The prosecutor then blurted out, "Your Honor, if this subject is opened up..." Defense counsel replied that he was referring to what had been placed in evidence. The Court then instructed the jury, "The issue of narcotics is not properly a part of this prosecution" (1017).

The prosecutor's interruption cannot be considered innocent. It was for no other purpose than to insinuate to the jury that the defendant was more involved in narcotics activity than the evidence revealed.* As pointed out above, see Point I(1), supra, the improper admission of some of the narcotics tapes was highly prejudicial to the defendant Ong. This error should not further have been compounded by the prosecutor alluding that he had further evidence of Ong's narcotics involvement.

There was no legitimate reason for the interruption by the prosecutor. Surely, it was not meant as gratuitious advice to counsel. If the prosecutor felt that the defense argument had "opened the door", he had the opportunity to respond in his rebuttal or, more cautiously,

*Similarly, during the testimony, the prosecutor on several occasions, in open court, in requesting bench conferences, hinted that he had further evidence that the judge had precluded (e.g., 187, 201). In fact, the Court saw fit to warn him to discontinue this practice (203-204).

to seek guidance from the Court at a bench conference prior to his rebuttal as to whether he had such a right.

The attempt to intimate to the jury that the Government knows more about the defendant than was presented in evidence is highly prejudicial. United States v. Lefkowitz, 284 F.2d 310 (2d Cir. 1960). And it was particularly harmful here since the narcotics evidence in the trial was itself improperly admitted. Once that evidence was admitted, counsel clearly had a right to try to minimize its effect.

In Lefkowitz, supra, at 314, in his summation, defense counsel stressed that the defendant had a good business and personal reputation. The Government attorney replied that there was "another side" to the defendant. The Court found improper the insinuation that the Government "knew a good deal about the defendant dehors the instant case." United States v. Lefkowitz, supra, at 314.* See, also, United States v. Somers, 496 F.2d 723 (3d Cir. 1974). Here, where the "other side" referred to alleged criminal activities well beyond the issue at trial, the prejudice was far greater.

Conclusion

The accumulation of these errors was such as to

*The Court in Lefkowitz, reversing the conviction on other grounds, left open whether it would reverse on that remark alone.

deprive the defendant Ong of a fair trial. This Court recently reversed a conviction based on the misbehavior of the prosecutor by inflammatory and insinuating statements in summation. United States v. Burse, supra. In that opinion, the Court quoted, with approval, at 2511, the language of Berger v. United States, 295 U.S. 78,88 (1935):

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.
>
> "It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none."

As this Court recognized in Burse, consistent warnings to prosecutors about improper statements in closing argument have had little effect. As Judge Frank wrote in United States v. Antonelli Fireworks Co., 155 F.2d 631, 661 (2d Cir. 1946) (Frank, J., dissenting), cert. denied, 329 U.S. 742 (1946):

> '"The deprecatory words we use in our opinions...are purely ceremonial.

> Government counsel, employing such tactics, are the kind who, eager to win victories, will gladly pay the small price of a ritualistic verbal spanking. The practice of this court -- recalling the bitter tear shed by the walrus as he ate the oysters -- breeds a deplorably cynical attitude towards the judiciary"'.

The only effective lesson is the lesson of reversal.

POINT III

THE COURT'S FAILURE TO EXERCISE ITS DISCRETION AND TO CONSIDER RELEVANT FACTORS INVALIDATES THE SENTENCING PROCEDURE.

In imposing an eight-year prison sentence on the 67-year-old defendant Ong, the Court explicitly refused to consider the cultural factors -- the history of official corruption in Chinatown and its effect on Chinese people living there -- that had caused the defendant to commit the crime for which he was convicted (S 37). By disregarding this history, the Court denied to the defendant the individualized treatment the law requires. Williams v. New York, 337 U.S. 241, 247-50 (1949); United States v. Hendrix, 505 F.2d 1233, 1236 (2d Cir.1974); Woosley v. United States, 478 F.2d 139, 146 (8th Cir. 1973 en banc).

In refusing to consider these cultural factors, the Court erroneously held as a matter of constitutional law that to do so would be a denial of equal protection and an espousal of "reverse discrimination", stating:

> "The Court is ready to accord individualized treatment to defendants in any case, and the Court is prepared to consider relative degrees of culpability. However, I am not prepared to take a different standard of sentencing based on any claim to cultural factors or any prior maltreatment of any particular class or group of immigrants to this country. I think to do so would be reverse discrimination, and it would negate the quality of justice and the equal protection of the laws, to which we consider ourselves dedicated." (S 36-37) (underscorings added)

What the Court apparently held, in sentencing this defendant, was, in the words of Anatole France, that "[t]he law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges". In a Circuit where the recent and proper emphasis has been to insure that "white-collar" criminals are subjected to the same sentencing standards as the deprived and disadvantaged, the Court turned that principle upside down, holding this long-time victim of official oppression subject to the same sentencing standard as, say, the prosperous head of a major corporation. Cf. United States v. Schwarz, 500 F.2d 1352 (2d Cir. 1974). Further, in contrast to the law in this Circuit, see United States v. Kahn, supra, the Court made clear in sentencing, though not before the jury, its view that no defendant should be permitted to benefit from the defense of economic coercion (913-14).

Additionally, the Court refused to give proper weight to the judgment of a distinguished and experienced state court judge who sentenced the defendant to an unconditional discharge in a contemporaneous, connected and similar bribery case. The Court did so apparently because of its opinion that there was no similarity between bribing allegedly corrupt policemen and allegedly corrupt immigration investigators:

> "I think there's a great difference between bribing a policeman to permit a gambling establishment to operate and bribing a federal official in a matter of such importance as is involved in this case, namely, the detection of illegal aliens" (866, see also S 36).

In the Court's view the latter was a serious federal offense while the former was an illegal but harmless and acceptable cost of operating a gambling house. And the Court maintained this view although the federal and state bribery cases involving the defendant Ong (the instant case and "the Nadjari arrest") were not only contemporaneous with each other but clearly a part of the same scheme and with the same end: to keep the gambling houses open.

Given this strange view of the relative importance of state and federal bribery, the sentencing court refused to give any weight to the fact that in the similar state case the late Justice John M. Murtagh had sentenced the defendant to an unconditional discharge (S 8-10). Indicted for thirty counts of bribery and one count of conspiracy (S 15-16), and convicted by plea of one count of bribery (864), the defendant received from Justice Murtagh, a jurist certainly not known for his lenient sentences and aware of the federal case, a non-custodial sentence. The obvious reason for that sentence was that Justice Murtagh, for many years the Chief Judge of New York City's lower criminal courts and as such learned in the ways of Chinatown gambling and official corruption, perceived what the Court below refused even to consider: that the defendant's conduct was a Pavlovian response to, and not a cause of, official corruption.

Believing neither in the defense of economic coercion nor in the mitigating factor of cultural history in relation to endemic official corruptions, the Court put no stock in Justice Murtagh's experienced reaction. Instead it used a "fixed and mechanical approach in imposing sentence",based only on its own standards, upon this aged and disadvantaged Chinese ghetto-dweller.

By refusing even to consider the relevant sentencing factors described above and avowedly with only "general deterrence" in mind (S 35), the Court gave the defendant Ong a sentence of eight years -- tantamount to a life term for this 67-year-old defendant.* The refusal to consider proper and relevant factors invalidates the sentencing procedure and requires a remand for re-sentencing. And, in remanding, this Court should suggest that the sentencing be in front of a different judge from the judge who sentenced the defendant. United States v. Rosner, 485 F.2d 1213 (2d Cir. 1973), cert. denied, 417 U. S. 950 (1974); Mawson v. United States, 463 F.2d 29 (1st Cir. 1972).

*Indeed, the defendant did not have the benefit of the recently-enacted sentencing guidelines instituted by the Court -- including the pre-sentence conference. The defendant respectfully requests that the case be remanded for resentencing before a different judge so as to enable him to benefit from the new procedures.

POINT IV

INSOFAR AS APPLICABLE TO HIM, DEFENDANT-APPELLANT ONG ADOPTS THE POINTS ARGUED BY DEFENDANTS-APPELLANTS WONG, TOM, AND YOUNG.

Defendant Ong respectfully requests that the points raised by his co-defendants be considered on his behalf insofar as they apply to him.

In particular, defendant Ong wishes to join in the point raised by co-defendant Wong Wah concerning the curtailment of cross-examination by Wong's counsel. This curtailment equally prejudiced defendant Ong since there was an obvious community of interest among the defendants charged in the same conspiracy and since he was a participant in the conversations involving narcotics that Wong's attorney sought to challenge. In addition, it was clearly understood by the Court and all attorneys that an objection or motion made by one attorney redounded to the benefit of all (7, 12, 19).

The cutting-off of Wong's counsel's cross-examination was compatible with the Court's belated and ineffectual efforts (See Points I(1) and II (8), supra) to stuff the cat back into the bag after the jury had already heard it howl. Realizing in mid-trial that the narcotics evidence concerning Ong and Wong should not have been admitted in the first place, since it was both irrelevant and highly prejudicial, the Court first cut-off Wong's attorney's cross-examination all together when he sought to show that Wong was not involved in

narcotics and then cut-off Ong's counsel's attempt in summation to minimize his client's narcotics involvement.

Taken together, these acts by the Court wrongfully deprived Ong and Wong of their rights, by cross-examination and argument, to undercut the Government evidence that it had already received and was never stricken despite the Court's eventual recognition that it had nothing to do with the case. The Government was not hampered in its offense, but the defendants were deprived of their defense. This prejudicial error equally harmed Ong and Wong, the two defendants who participated in the narcotics dialogue; it mandates reversal.

CONCLUSION

For all the above reasons it is respectfully submitted that the conviction of defendant Ong should be reversed and a new trial ordered, or, in the alternative, that the case be remanded for sentencing before a different judge.

Respectfully submitted,

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On the brief

April 8, 1976

A 202 Affidavit of Personal Service of Papers — LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

- against -

BENNY ONG, WONG WAH, YOM HOM AND ALBERT YOUNG,
Defendants- Appellants.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF **NEW YORK** *ss.:*

I, Victor Ortega, *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 1027 Avenue St. John, Bronx, New York

That on the **9th** *day of* **April** *19* **76** *at* **see attached**

deponent served the annexed **APPENDIX BRIEF** *upon*

see attached

the **Attorneys** *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein.*

Sworn to before me, this **9th** *day of* **April** *19* **76**

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977

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